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July 2, 1984

Mr. R. B. Nicholls
Commissioner
Arizona Real Estate Department
1645 West Jefferson
Phoenix, Arizona 85007

Re: I84-095 (R84-018)

Dear Commissioner Nicholls:

You have asked for our opinion on two questions:

1. Whether mobile home and apartment cooperatives are included within the definition of subdivision or subdivided lands in A.R.S. § 32-2101.31; and

2. Whether Attorney General opinion 61-75, concluding that cooperatives are not subdivisions, is still valid.

A.R.S. § 32-2101.31 defines subdivision or subdivided lands as follows:

> Improved or unimproved land or lands divided or proposed to be divided for the purpose of sale, lease, or for cemetery purposes, whether immediate or future, into four or more lots, parcels or fractional interests . . . [T]his definition shall not be deemed to include the leasing of agricultural lands, or of apartments, offices,

> stores, hotels, motels, or similar space within an apartment building, industrial building or commercial building except that horizontal property regimes as defined in Title 33, Ch. 4.1 shall be included in this definition . . . .

The critical term in the definition for purposes of this opinion is "fractional interest" which is defined at A.R.S. § 32-2101.12 as "[a]n undivided interest in improved or unimproved lands." If an interest in a cooperative is "an undivided interest in lands," the cooperative falls within the definition of subdivision. For the reasons set forth below, we conclude that, under the present statutory language, an interest in a stock cooperative is an interest in the cooperative association, not "an undivided interest in improved or unimproved lands."

We note initially that the legislature has not defined cooperative in a statute relative to the question at issue.[1/] We must therefore look elsewhere to determine the nature of an individual's interest in a cooperative. As one treatise has pointed out, an individual who purchases a portion of a cooperative purchases stock in the cooperative association and not the actual real estate. 15 Am. Jur.2nd Condominiums § 60. As that treatise also points out:

> There is language in some early cases that the purchaser of a co-operative apartment holds "legal title" to the apartment; it has also been said that where legal title to an apartment house is held by an non-profit co-operative corporation while, in all intents and purposes the entire equitable estate is distributed proportionally among the owners of the apartment, ownership of the apartment constitutes an interest in real property. It appears to be the more

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1. A.R.S. § 9-463.02 includes cooperative in the definition of subdivision, but that definition is inapplicable to Title 32. See Transamerica Title Insurance Company v. Cochise County, 26 Ariz.App. 323, 328, 548 P.2d 416 (1976).

> general rule, however, that tenants in a co-operative housing project are the owners of stock and are not entitled to receive a deed of their fractional part of the real estate they occupy, as stockholders they have no more legal or equitable right to the real estate of the corporation than stockholders in any corporation owning real estate.

Id. at § 78 (emphasis supplied).

As another authority has noted, in the most common form of cooperative organization, the prospective owner buys a block of shares corresponding to the value of, and allocated to, the apartment he will occupy from the corporation holding title to the building. 2 P. Rohan and M. Reskin, Cooperative Housing Law and Practice, § 2.01(5) (1975).

We may also look to California Coastal Comm'n v. Quanta, Inc., 170 Cal.Rptr. 263 (App. 1981) for guidance. Analyzing language similar to A.R.S. § 32-2101.31, the California court found that the term "subdivision" does not include a stock cooperative, stating:

> There is a crucial difference between stock cooperatives on the one hand, and condominiums and community apartment projects on the other. The occupants of condominiums and community apartments are themselves owners of undivided interests in the land on which they reside; by way of contrast, the shareholder in a stock cooperative is a mere lessee, and stands in a landlord-tenant relationship to the corporation which owns the land.

Id. at 272.

Under California real estate law, stock cooperatives were specifically included in one regulatory scheme and not mentioned in another. The court said:

> [T]he extended legislative history of making the stock cooperative subject only to the subdivided lands act and omitting it from

> the Map Act while the community apartment and the condominium are expressly named in both acts, connotes a conscious legislative limitation of the Map Act to exclude the stock cooperative from its purview. The overriding principle here applicable is that when a statute omits a specific matter from its coverage, the inclusion of such matter in another statute on a related subject demonstrates the intent to omit the matter from the coverage of the statute in which it is not mentioned.

Id. at 274.

We recognize that courts in other jurisdictions have held that these interests are not securities. However, the fact that these interests are not securities does not convert them to real estate. These courts simply did not address whether these interests are interests in land. These cases are, thus, inapposite to the question of whether the Arizona Real Estate Department has the jurisdiction to regulate the sale of mobile home and apartment stock cooperatives. For instance, United Housing Foundation, Inc. v. Formen, 421 U.S. 837 (1977) is a United States Supreme Court case in which the court considered whether shares of stock entitling a purchaser to lease an apartment in Co-op City, a state supervised non-profit housing cooperative, are "securities" within the purview of the Securities Act of 1933 and the Securities Exchange Act of 1934. The court concluded that they were not. In AMR Realty Company v. New Jersey, 373 A.2d 1002 (1977), the question was whether shares in a cooperative are securities under the state securities law. In Sanders v. Tropicana, 31 N.C.App. 276, 229 S.E.2d 304 (1976), the court addressed whether the Board of Directors of a cooperative apartment may withhold consent to a transfer of stock. None of these cases relates to whether these offerings can be regulated as sales of real estate.

Finally, you have inquired about the validity of former Ariz.Atty.Gen.Op. 61-75. At the time that opinion was issued, the term "subdivision" was defined as:

> Land subdivided or prepared to be subdivided for the purpose of sale or lease, whether immediate or future, into five or more lots or parcels.

The statute did not define subdivision to include fractional interests in land. Accordingly, this office concluded that A.R.S. § 32-2181 did not regulate the sale of cooperative apartments. Since the definition of subdivision has now been changed to include fractional interests,the analysis in our former opinion is no longer applicable to the interpretation of the subdivision statute. However, the fact that Ariz.Atty.Gen.Op. 61-75 is no longer viable does not alter our conclusion that A.R.S. § 32-2101.31 as it defines subdivision does not include an interest in a mobile home or apartment stock cooperative.

Very truly yours,

Bob Corbin

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Attorney General

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